STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, et al.

Plaintiffs,

v. Case No. 19-CV-0302

ROBIN VOS, et al.

Defendants.

DEFENDANT GOV. TONY EVERS' RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

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Defendant and Governor of the State of Wisconsin Tony Evers ("Governor Evers"), by his attorneys, files this brief in support of Plaintiffs SEIU et al.'s ("Plaintiffs'") motion for temporary restraining order and temporary injunction. (Pls' Mot., Doc#8.)

Plaintiffs have challenged extraordinary session legislation passed in the waning days of 2018, shortly before Governor Evers and Attorney General Joshua Kaul, both Democrats, could take office. Not coincidentally, the legislation drastically narrowed the power of these executive offices in favor of the Republican Legislature, or in some cases, a subset of the Legislature. *See* 2017 Wis. Acts 369, 370. This transparent and rushed attempt to stymie the incoming administrations went too far.

Wisconsin's Constitution provides, "[t]he executive power shall be vested in a governor," Art. V, § 1. Among the Governor's duties are to "transact all necessary business with the officers of the government" and to "take care that the law be faithfully executed." *Id*. Art. V, § 4. The extraordinary session legislation challenged in this case unduly burdens and substantially interferes with these duties, creating barriers to execution of the law and violating separation of powers principles. By reallocating powers from the executive branch to the legislative branch, the legislation crossed an age-old line:

> "it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them." . . . Absent separation, those who make the laws "may exempt themselves from obedience," or they might "suit the law, both in its making and execution, to their own private advantage."

Gabler v. Crime Victims Rights Bd., 2017 WI 67, ¶ 5, 376 Wis. 2d 147, 154, 897 N.W.2d 384, 387 (quoting John Locke, *The Second Treatise of Civil Government* § 143 (1764), *reprinted in Two Treatises of Government* 119, 194 (Thomas I. Cook ed., 1947).)

The Plaintiffs in this case are likely to succeed on the merits of their claims that portions of 2017 Acts 369 and 370[1] unconstitutionally infringe on the executive branch by creating and setting new rules for agency "guidance documents" and inserting the Legislature into litigation by and against the State, a measure which also infringes on the judiciary's authority. The Plaintiffs are also likely to succeed on their claim that the legislation permits legislative committees to evade bicameralism, presentment, and quorum limits on the Legislature's own activities. Additional portions not challenged by the Plaintiffs suffer the same infirmities and should also be reviewed by the Court.[2] As further explained below, the legislation will make executing the law, rendering services to the citizens and businesses of Wisconsin, and using tax dollars in an efficient manner practically impossible. An injunction is necessary to preserve the status quo as it was prior to the legislation, and both the Executive Branch and Plaintiffs will suffer irreparable harm for which no remedy at law exists if the injunction is not entered. The motion should be granted.

[1] These sections are:

- Act 369 Sections 31, 35, 38, 65-71 (relating to guidance documents), and Sections 16 and 87 of Act 369 and Sections 10 and 11 of Act 370 (relating to legislative pre-approval of certain executive actions)
- Act 369 Sections 5, 26, 30, and 97 (relating to litigation and settlement) and
- Act 369 Sections 10, 11, 16, 26, 30, 64, and 87 and Act 370 Sections 10 and 77 (relating to legislative bicameralism, presentment, and quorum requirements).

Plaintiffs also challenge Section 35 of Act 369, but Governor Evers does not. *See* footnote 9, *infra*.

[2] These sections are: Act 369 Sections 33 (relating to guidance and other documents) and Sections 28, 29, and 99 (relating to intervention in litigation).

FACTS

Plaintiffs' pleadings capture the circumstances under which 2017 Wisconsin Acts 369 and 370 were proposed, passed, and enacted. (Compl. ¶¶ 35-48, Doc.#1; Pls' Br. at 3.) Governor Evers focuses on the impacts this legislation will have on the Executive Branch and its ability to provide services to members of the public such as Plaintiffs.

Act 369 creates a broad new classification of agency document called "guidance documents," Act 369, § 31 (creating Wis. Stat. § 227.01(3m)), and requires publication, 21 days' notice, comment, certification, and other requirements for all new **and** existing guidance documents, *id*. § 38. Existing documents that do not comply by July 1, 2019, will be rescinded by operation of law. *Id*. A separate section of Act 369 not challenged by the Plaintiffs also requires agencies to retroactively insert statutory and administrative rule citations that support "any statement or interpretation of law" into agency websites, guidance documents, and other documents. *Id*. § 33.

A conservative estimate is that there are over 200,000 existing agency guidance documents across state government, Nilsestuen Aff. ¶ 14. This does not include an agency's email correspondence that meets the definition of a guidance document. *Id*. For example, the state's Department of Workforce Development ("DWD") uses documents and websites that likely meet the definition of "guidance" to administer state and federal laws, and to communicate with the public regarding compliance with forms; electronic filings; on-going weekly claims; financial and medical documentation for worker's compensation claims; eligibility determinations; financial processing and reimbursements for clients, vendors, service providers, and employers, to name just a few. (Richard Aff., ¶ 3.) Of DWD's six divisions, the Division of Vocational Rehabilitation has nearly 200 documents and answers

to Frequently Asked Questions ("FAQs") that could qualify as "guidance," whereas the Workers' Compensation Division has over 72,000. (*Id.* ¶ 5.) Meanwhile, the Department of Corrections has located 450 existing guidance documents to date, and estimates it will issue 360 new documents every year. (Karaskiewicz Aff., ¶¶ 4-5.) The Department of Veterans Affairs, which provides a range of services and programs for Wisconsin veterans and their families, has identified 806 existing guidance documents so far, with 100 to 200 more created every year. (Koplien Aff., ¶¶ 2, 5-6.) The Department of Health Services has an early estimate of close to 30,000 documents to review, over 12,000 existing guidance documents to adopt, and an estimated 2,500 new documents to issue each year. (Rowe Aff., ¶ 10.)

An "entire new level of professional staff" will be required to conduct reviews for new and existing documents, as well as information technology staff to update guidance on agency websites and in videos. (Richard Aff. ¶¶ 3, 5, 7; Rowe Aff. ¶ 10.)[3] Inserting statutory citations in agency websites and documents will also take significant staff time, including documents issued in other languages for Spanish, Hmong, and other non-English speakers. (Richard Aff. ¶¶ 12-14.) Increases to administrative time within federally-funded programs will make it more difficult to comply with federal funding and program requirements. (*Id.* ¶ 18.) Costs to taxpayers at just the Department of Corrections will likely exceed $625,000 in the first year (Karaskiewicz Aff., ¶ 6), and annual costs at the Department of Veterans Affairs are estimated at $355,000 to $400,000 (Koplien Aff., ¶ 7.) Ultimately, compliance with the legislation is likely to cost millions of taxpayer dollars. (Cain Aff., 1/19/19, ¶ 9.)[4]

[3] This assumes a technically feasible way to provide notice and accept comment on agency videos, interactive online modules, and webcasts can be developed. (Nilsestuen Aff., ¶¶ 20-22.)

[4] The affidavits of Michael Cain, John Greene, and Kristi Kerschensteiner were originally filed in *League of Women Voters of Wisconsin et al. v. Knudson et al.*, Dane County Case No. 19-CV-84, and are attached to the Affidavit of Counsel, filed herewith.

The extraordinary session legislation included no additional appropriations to hire staff or otherwise implement the requirements of the law (Rowe Aff., ¶ 11), and the inability to hire new staff to comply with Act 369 and 370 will compromise the legal operations of agencies such as Veterans Affairs (Koplien Aff., ¶ 8).

Because agencies will not be able to realistically update all guidance documents before the July 1, 2019 sunset date, it is likely that many documents will be rescinded without any replacement to assist the public. (Cain Aff., ¶ 11; Greene Aff., ¶ 6; Richard Aff., ¶¶ 8-9.) Rescission of these documents will impair agencies like the Department of Natural Resources in applying the provisions of the law they are charged with enforcing and providing consistent interpretations that keep up with science and engineering advancements. (Cain Aff., ¶ 5.) Members of the public and vulnerable populations, such as people with disabilities, would otherwise rely on these documents to obtain services and rely on consistent application of the law. (Kerschensteiner Aff., ¶ 14.) For new guidance documents, the 21-day comment period and other processes will make it impossible for agencies to post time-sensitive guidance, such as guidance on unemployment insurance to workers suffering sudden layoff. (*See* Richard Aff., ¶¶ 10, 19.)

Agencies will also have to delay other projects and duties in order to comply with the guidance document requirements in Act 369, negatively affecting the day-to-day operations of the agencies and the ability of agencies to serve the public. (*E.g.*, Karaskiewicz Aff., ¶ 7; Richard Aff., ¶ 6; Rowe Aff., ¶ 11-12.) These include timely fulfillment of open records requests, reviews of agreements and compliance with fiscal estimates, timely biennial report review and rulemaking, monitoring current programs, and the ability of agency legal counsel to provide timely counsel and advice to their respective agencies. (Karaskiewicz

Aff., ¶ 7; Rowe Aff. ¶ 11-12.) At the Department of Health Services, staff may also need to divert resources intended to improve delivery of Medicaid Services. (Rowe Aff., ¶ 11.) Because the July 1, 2019 guidance document sunset falls at the same time as the biennial budget is due, it is likely that staff time that would normally go towards developing the budget will be diverted to guidance duties. (Rowe Aff. ¶ 12; Nilsestuen Aff. ¶ 19.) In short, state agencies will not be able to comply with Act 369's guidance document provisions without significant expense, seriously delayed or diminished services, and a significant reduction in information provided to and relied on by the public. (Nilsestuen Aff., ¶ 13.)

Act 369 also removes litigation authority from the Governor and Attorney General, and permits the legislature or committees thereof to intervene in litigation and pre-approve settlements involving the state. Act 369 and Act 370 also empower legislative committees to suspend administrative agency rules and take other actions short of obtaining the full legislature's and governor's consent. These sections are discussed in Sections I.B. and I.C, *infra*.

ARGUMENT

Plaintiffs have stated the criteria for obtaining a temporary injunction (Pls' Br. at 8, Doc.#9) and meet these criteria here. They are 1) likely to succeed on the merits of their claim, 2) require an injunction to preserve the status quo, and 3) will be irreparably harmed if an injunction is not entered and have no remedy at law. The Court should grant Plaintiffs' motion for temporary restraining order and temporary injunction.

I. Plaintiffs are likely to succeed on the merits of their claims that the challenged provisions of 2017 Act 369 and Act 370 are unconstitutional.

A. Act 369's provisions relating to agency guidance violate the Constitution's separation of powers principles and unduly burden the Executive.

The Plaintiffs are likely to succeed on their merits of their claim that Sections 31, 38, and 65-72 of the Act, which create onerous and unworkable procedures for agency guidance, are unconstitutional. The same is true for Act 369, Section 33. Additionally, the Plaintiffs are likely to succeed on their claim that Sections 16 and 87 of Act 369 and Sections 10 and 11 of Act 370 intrude on the Executive by requiring legislative preclearance for certain executive decisions.

1. The Governor possesses primary constitutional authority to interpret and apply the law.

Wisconsin's state constitution creates three separate branches of government, with "distinct functions and powers." *Gabler*, 376 Wis. 2d 147, ¶ 11 (citation and internal quotation marks omitted). "The legislative department determines what the law shall be, the executive department executes or administers the law, and the judicial department construes and applies the law." *State* ex rel. *Warren v. Nusbaum*, 59 Wis. 2d 391, 448–49, 208 N.W.2d 780, 813–14 (1973). The purpose of this separation of powers is to prevent power from concentrating in any one location within government, to incentivize the branches to challenge encroachment by the others, and ultimately, to prevent tyranny. *Gabler*, 376 Wis. 2d 147, ¶¶ 2, 7.

"Each branch has a core zone of exclusive authority into which the other branches may not intrude." *State* ex rel. *Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 13, 531 N.W.2d 32, 36 (1995). Once the legislature has set policy, implementation of that policy is an executive function. *J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n*, 114 Wis. 2d 69, 104–06, 336 N.W.2d 679, 696 (Ct. App. 1983) (power to grant or withhold approval of a construction contract is an executive function).

"[U]nder Wisconsin's constitution, powers may be shared between and among branches, so long as the power at issue is not a 'core' power reserved to one branch alone." *Panzer v. Doyle*, 2004 WI 52, ¶ 51, 271 Wis.2d 295, 680 N.W.2d 666, (*overruled on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis.2d 1, 719 N.W.2d 408). In a case where there is a sharing of powers, the test for unconstitutionality is whether one branch has unduly burdened or substantially interfered with another branch's role and powers. *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 696–97, 478 N.W.2d 582, 585 (1992). "The concern is with 'actual and substantial encroachments by one branch into the province of another, not theoretical divisions of power.'" *Id*. (quoting *J.F. Ahern v. Wisconsin State Bldg. Comm'n,* 114 Wis.2d 69, 104, 336 N.W.2d 679 (Ct.App.1983)).

While state administrative agencies are creations of the legislature, *see Martinez*, 165 Wis. 2d at 697, they are also a locus of shared powers, *see Layton Sch. of Art & Design v. Emp't Rel. Comm'n*, 82 Wis. 2d 324, 347-48, 262 N.W.2d 218, 229 (1978) ("'If the doctrine of the separation of powers were a doctrinaire concept to be made use of with pedantic vigor, the use of the modern administrative agency would have been an impossibility in our law.'" (quoting Schwartz, The Supreme Court 102 (1957)). Specifically, "the legislative branch and the executive branch share inherent interests in the legislative creation and oversight of administrative agencies." *Martinez*, 165 Wis. 2d at 697.

The breakdown of legislative and executive control over agencies relates back to the power that is delegated to or exercised by agencies. For example, agency rulemaking is a delegated legislative power, consistent with the Legislature's policy-making role. *See State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941–42 (1928); *see also Clintonville Transfer Line v.*

PSC, 248 Wis. 59, 68-69, 220 N.W.929 (1945). As such, the legislature properly retains the right to review any rules the agency has promulgated under that delegated power. *Martinez*, 165 Wis. 2d at 701 (holding that Wis. Stat. § 227.46, providing for temporary legislative suspension and repeal of administrative rules, is constitutional).

Yet agencies exercise an operational and interpretative role that flies below the level of rulemaking, and that is within the province of the Governor as "the chief administrative officer of the state" and the "administrative agencies [that] comprise . . . the executive branch." Wis. Stat. §§ 15.001(2)(a), (b); *see also Wendlandt v. Indus. Comm'n*, 256 Wis. 62, 67, 39 N.W.2d 854, 856 (1949) ("the legislature may clothe administrative officers with power to ascertain whether certain specified facts exist, and thereupon to act in a prescribed manner **without delegating to such officers legislative or judicial power within the meaning of the constitution**") (emphasis added). As distinct from agencies' rulemaking role,

> The executive must certainly interpret and apply the law; it would be impossible to perform his duties if he did not. After all, he must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). **Our constitution not only does not forbid this, it requires it**. Wis. Const. art. V, § 1 ("The executive power shall be vested in a governor[].") . . . .

Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 53, 382 Wis. 2d 496, 543, 914 N.W.2d 21, 44 (emphasis added); *see also Whitman*, 196 Wis. 472, 220 N.W. at 938 ("Every executive officer in the execution of the law must of necessity interpret it in order to find out what it is he is required to do."). This interpretation and application occurs within administrative agencies.

Agencies' day-to-day interpretation and implementation of the law is an executive function which the Legislature cannot unduly burden, and with which it may not substantially interfere.

2. Sections 31 and 38, and Section 33, unduly burden and substantially interfere with the Governor's authority to interpret and implement the law.

Section 31 and 38 of Act 369 unduly burden and substantially interfere with the Executive Branch's operational and interpretative duties by requiring administrative agencies to take numerous onerous steps before making simple statements or interpretations of the law, and further, by requiring agencies to take these steps retroactively for all guidance issued, apparently, in the agency's history. The Plaintiffs are likely to succeed on their claim that these provisions are unconstitutional. For the same reasons, the Court should also find that Section 33 is unconstitutional.

Section 31 of Act 369 creates a new classification of agency document called "guidance document." Act 369, § 31 (creating Wis. Stat. § 227.01(3m)). Guidance documents are explicitly ***not*** rules. *Id*. (creating Wis. Stat. § 227.01(3m)(b)1); *see also* Wis. Stat. § 227.01(13) (separately defining "rule"). Nor do they have force of law. Wis. Stat. § 227.112(3). They are also not documents required to be created by statute, declaratory rulings under Wis. Stat. § 227.41, decisions of administrative law judges, court pleadings, attorney general opinions, and certain other enumerated documents. *See id*. Rather, "guidance documents" are "any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin," that either 1) explains the agency's implementation of a statute or rule that it administers, including the current or proposed operating procedure of the agency, or 2) provides guidance or advice

with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, "if that guidance or advice is likely to apply to a class of persons similarly affected." Act 369, § 31. This is an extraordinarily broad definition encompassing anything on agency letterhead or with an agency logo that advises the public about a statute or rule in any fashion.

For any new "guidance documents," Section 38 of Act 369 requires agencies to undertake a "mini-rulemaking" process for each document. Before adopting the guidance, agencies must send a copy to the Legislative Reference Bureau with a notice of public comment period, accept public comment for 21 days and indefinitely thereafter, consider all public comments before finalizing the guidance, and retain copies of all guidance and post it on the agency website. Act 369, § 38. The agency head or Secretary must sign or certify the guidance with a statement that the interpretation is, in essence, allowed by law. *Id*.[5] In addition, any existing documents that meet the definition of "guidance" will automatically be rescinded if an agency does not take these same steps for each document before July 1, 2019. *Id*. This will require agencies to first locate and inventory any document that could be construed as guidance, then go through the process of noticing and posting the guidance with all required explanatory material in a matter of months. *Id.*

[5] The certification must read:

> "I have reviewed this guidance document or proposed guidance document and I certify that it complies with Sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes."

2018 Wis. Act 369, § 38(6).

Another section of Act 369, not challenged by the Plaintiffs but equally burdensome, requires agencies to "identify the applicable statutory or administrative code provision that supports any statement or interpretation of law that the agency makes in any publication, whether in print or on the agency's Internet site, including guidance documents, forms, pamphlets, or other information materials, regarding the laws the agency administers." *Id.* § 33. There is no grace period for this provision: it is in effect now. It will take significant time for agencies to locate all guidance *or other documents* that contain a statement or interpretation of the law that the agency administers, and insert the proper statutory or rule cite into the document. (*E.g.*, Rowe Aff., ¶ 7, 10.)

These Act 369 provisions unduly burden and substantially interfere with agencies' day-to-day interpretation and implementation of the law within their respective jurisdictions, which the Constitution requires the Executive to undertake. *Tetra-Tech*, 382 Wis. 2d 496, ¶ 53; *see generally* Fact section, *supra*. A major task of most agencies is to administer the law and help individuals, businesses, local governments, and those subject to regulation understand the law and how it applies to them and particular fact situations. (*E.g.*, Richard Aff., ¶¶ 3, 8.) Guidance documents are usually not controversial and are both necessary and useful for the efficient and consistent application of the law and complex programs. (Cain Aff., 1/9/19, ¶ 5.) Agencies accomplish these tasks through letters, memoranda, manuals, guidebooks, outlines, website, pamphlets—in other words, "guidance documents." (*E.g.*, Richard Aff., ¶¶ 8, 10, 13.)

Agencies will henceforth be unable to issue this information or carry out their other duties in a timely or efficient manner due to the make-work required by Act 369. *See generally* Fact section, *supra*. The retroactive application of Section 38 to existing guidance

documents, and the revisions to existing guidance and other documents required under Section 33, are practically impossible to achieve. (Richard Aff., ¶ 3; Nilsestuen Aff., ¶ 13; Rowe Aff., ¶¶ 8-12.) The obligations will impair performance of existing duties and other executive functions, like preparing the biennial budget, providing information to the public, and processing permit applications. (Karaskiewicz Aff., ¶¶ 6-7; Rowe Aff., ¶¶ 11-12; Cain Aff., ¶ 10.) The cost of Act 369 is also extreme, ultimately totaling in the millions of dollars. (Cain Aff., ¶ 9.) While these activities will impair the executive function (*id*. ¶ 8; Koplien Aff., ¶ 8), the ultimate impact will fall on those who rely on government interpretations of the law for services and help, including the unemployed and disabled (Kerschensteiner Aff., ¶ 14; Richard Aff., ¶ 3),

The Legislature did not have the right or authority to demand these steps. Agencies' "power to give advice" is not policy or rulemaking. *see Whitman*, 196 Wis. 2d 472, 220 N.W.2d at 942. That has already been done in the legislative and rulemaking process. Indeed, the Legislature itself has provided that guidance documents are not law and do not, unlike rules, have the force of law. Act 369, § 38(3); *see also* Wis. Stat. § 227.01(13) (providing that rules have the force of law). Guidance documents have no policymaking heft and are outside the Legislature's constitutional purview. Rather, the letters, manuals, and handbooks that constitute guidance are "carrying out those programs and policies [the legislative branch has created], a function of the executive branch." *JF Ahern*, 114 Wis. 2d at 105.

The Legislature articulated no policy or purpose for these provisions. Instead, it passed Act 369 as a transparent attempt to burden the incoming Governor and make it significantly more difficult for him to operate the executive branch, serve the citizens of the

state, and "take care that the laws be faithfully executed."[6] The Legislature's overreach goes far beyond "common sense and the inherent necessities of governmental co-ordination." *Whitman*, 196 Wis. 472, 220 N.W.2d at 940 (citing *Hampton v. U.S.*, 48 S. Ct. 348, 72 L. Ed. 624). The Court should find Plaintiffs are likely to succeed on the merits of their claim that Sections 31 and 38 of Act 369 are unconstitutional and violate the separation of powers. It should make the same finding for Section 33.

3. Sections 65 to 72 unduly burden and substantially interfere with the Executive branch by permitting judicial review of all guidance documents.

For the same reasons articulated above, Sections 65 to 72 of Act 369 unduly burden and substantially interfere with the executive branch. (Pls' Compl. ¶¶ 91, 92, 108.) These provisions make "guidance documents" subject to judicial review through the declaratory judgment procedure in Wis. Stat. § 227.40, which until now applied only to administrative rules.

As recognized above, the Legislature has an interest in ensuring agencies correctly exercise their delegated rule-making authority. Courts have recognized judicial review of administrative rules under Wis. Stat § 227.40 as a legitimate guard against agency overreach in the rulemaking process. *E.g., Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis. 2d 368, 387-89, 401 N.W.2d 805, 813-814 (1987). Judicial oversight of agencies

[6] Furthermore, the Legislature forgets that "'Agency' is defined very broadly in Wisconsin: 'Agency' means a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer.' Wis. Stat. § 227.01(1)." *Coyne v. Walker*, 2016 WI 38, ¶ 17, 368 Wis. 2d 444, 460, 879 N.W.2d 520, 528. It includes the Department of Public Instruction ("DPI"), under the supervision of another constitutional officer, the state superintendent of public instruction. *Id*. For the reasons articulated in *Coyne*, Act 369 is likely unconstitutional as to DPI because it burdens the agency's supervisory powers when those powers are carried out through guidance documents. *Id*. ¶ 35. It may also be unconstitutional as to boards and other entities associated with the court system.

does not end there, as agency decisions "which adversely affect the substantial interests of any person" are reviewable under Wis. Stat. § 227.52. *See State* ex rel. *Thompson v. Nash*, 27 Wis. 2d 183, 194, 133 N.W.2d 769, 775–76 (1965) ("Because of the scope of review granted by [the Administrative Procedure Act], any denial of due process can in most instances be adequately remedied thereunder."). These two provisions for judicial review have effectively preserved the Legislature's interest in rulemaking oversight, and safeguarded individual rights from agency overreach, since Wis. Stat. ch. 227 was created in 1943. *See* Ralph M. Hoyt, The Wisconsin Administrative Procedure Act, 1944 Wis. L. Rev. 214 (1944).

Judicial review of what Act 369 terms "guidance documents," however, is a vast, unnecessary, and unworkable expansion of judicial review of administrative agency action. It is vast, because it applies to the many thousands of guidance documents agencies have created over the last several decades and will create in the future. (*See* Nilsestuen Aff., ¶ 14.) It is unnecessary, because judicial review of guidance documents does not safeguard any right that is not already protected. For example, handbooks and other documents that explain or summarize existing law do not create rights or enforce laws. There is nothing to challenge in these generalized interpretations of the law. If agency policy or practice becomes so regularized or entrenched as to act as a rule, it can still be challenged as failing to go through the normal rulemaking process under Wis. Stat. ch. 227, subch. II. *E.g., Cholvin v. Dep't of Health & Family Servs.*, 2008 WI App 127, ¶ 34, 313 Wis. 2d 749, 765, 758 N.W.2d 118, 126 (finding agency instruction was an unpromulgated rule and invalid). Orders, decisions, and even letters that arguably go too far in applying statutes and rules to an individual or discrete set of facts can be reviewed under Wis. Stat. § 227.52. Judicial review of guidance documents adds nothing to this calculus.

By so expanding judicial review, Sections 65 to 72 unduly burden and substantially interfere with executive authority to operate the agencies that comprise the executive branch. The Court should find the Plaintiffs have a likelihood of success on the merits of their challenge to these sections.

4. Sections 16 and 87 of Act 369 and Sections 10 and 11 of Act 370 unconstitutionally insert the Legislature into Executive decisions.

The Plaintiffs have alleged that Sections 16 and 87 of Act 369 and Sections 10 and 11 of Act 370[7] unduly burden and substantially interfere with the executive branch by requiring pre-clearance from the Legislature or its committees before the Executive or agencies may take certain actions. (Pls' Br. at 14; Compl. ¶¶ 96-97.)[8] They are right.

For example, Act 370, Section 10 requires agencies to obtain legislative approval before submitting requests to federal agencies for a waiver or a renewal, modification, withdrawal, suspension, or termination of a waiver of federal law or rules or for authorization to implement a pilot program or demonstration project. Yet federal Medicaid

[7] These sections are:

Section 16, Act 369: requires JCLO to be notified and, where it chooses, to approve security changes at the Capitol

Section 87, Act 369: requires JCLO to be notified and, where it chooses, to approve new enterprise zones created by the Wisconsin Economic Development Corporation

Section 10, Act 370: requires agencies to obtain legislative approval before submitting requests to federal agencies for a waiver or a renewal, modification, withdrawal, suspension, or termination of a waiver of federal law or rules or for authorization to implement a pilot program or demonstration project.

Section 11, Act 370: requires JCLO to be notified and, where it chooses, to approve reallocations of funds for a variety of public works programs, many of which are federally-funded.

[8] Governor Evers addresses constitutional defects in the legislative committee procedure in Section I.C., *infra*.

requirements require states to designate a single state agency to administer or supervise the administration of a state's Medicaid plan. 42 U.S.C. § 1396a(a)(5); 42 CFR § 431.10.

In Wisconsin, this is the Department of Health Services ("DHS"). Inserting the Legislature into the administration of the Medicaid program risks non-compliance with the rules attached to federal funding, and with which Wisconsin has agreed to comply. *See* Wis. Stat. § 16.54(4). Further, Medicaid waivers allow a state to waive certain Medicaid program requirements that permit a state to provide care for people who might not otherwise be eligible for the program. (Rowe Aff., ¶ 17.) The additional level of approval under Act 370, Section 10, and potential for disapproval and delay, is likely to interfere with DHS's ability to appropriately administer the Medicaid program and provide services to Wisconsin residents. (*Id*. ¶ 17.)

The Plaintiffs are likely to succeed on their claim that the challenged sections of Acts 369 and 370 unduly burden and substantially interfere with the executive branch, and their motion should be granted.[9]

[9] Unlike the Plaintiffs, the Governor does not in this case challenge Section 35 of Act 369, which provides that "No agency may seek deference in any proceeding on the agency's interpretation of any law." The Wisconsin Supreme Court recently discontinued its practice of affording deference to agencies' legal interpretations as an intrusion on the judicial power. *Tetra-Tech*, 382 Wis. 2d 496. Arguably, Section 35 unconstitutionally burdens the judiciary's right to determine what arguments it may accept in court, as well as the executive's right and duty to choose the best litigation strategy to implement the law. In order to give this statute a saving construction that avoids constitutional infirmities, however, the Court should read Section 35 as simply a codification of *Tetra-Tech* (albeit an unnecessary one) rather than an attempt to burden the affairs of the judicial and executive branches. *See Panzer v. Doyle*, 2004 WI 52, ¶ 65, 271 Wis. 2d 295, 339, 680 N.W.2d 666, 688, *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 65, 295 Wis. 2d 1, 719 N.W.2d 408 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.").

B. Act 369 violates separation of powers principles by granting the Legislature the Executive's authority to prosecute cases on behalf of the state.

Prosecuting and defending cases on behalf of the state is a core function of the Executive Branch. The four sections of Act 369 challenged by the Plaintiffs—Sections 5, 26, 30, and 97,[10] as well as Sections 28, 29, and 99[11]—unlawfully and unconstitutionally intrude on this function and impermissibly allocate such powers to the Legislature. (Compl. ¶¶ 65-

[10] Plaintiffs have challenged the following sections of Act 369:

- Section 5: Permits the assembly committee on organization, committee on senate organization, and joint committee on legislative organization ("JCLO") to intervene in any state or federal lawsuit when a statute is challenged as unconstitutional or preempted, or when the "construction or validity" of a statute is otherwise challenged, and to be represented by counsel other than the Department of Justice.

- Section 26: Removes the ability of the Governor to settle or discontinue any civil action the executive branch or Attorney General initiates and requires the intervenor in Section 5 to approve of any settlement or, or if there is no intervenor, requires the joint committee on finance ("JCF") to approve of the settlement plan. Prohibits submission of any settlement plan that concedes the unconstitutionality, preemption, or invalidity of a statute unless JCLO approves.

- Section 30: Removes the ability of the Attorney General to settle any case where he is defending the state and where injunctive relief is requested or a consent decree proposed, unless the intervenor in Section 5 has approved. If there is no intervenor, the Attorney General must submit a settlement plan to JCF and provide an opportunity for approval or disapproval. Prohibits submission of any settlement plan that concedes the unconstitutionality, preemption, or invalidity of a statute unless JCLO approves.

- Section 97: Creates Wis. Stat. § 803.09(2m) to allow intervention as of right for the entities described in Section 5 in any state or federal court action when a statute is challenged as unconstitutional or preempted, or when the "construction or validity" of a statute is otherwise challenged. Entities may intervene "at any time" by filing a motion under Wis. Stat. § 801.14.

(Compl. ¶¶ 65-78, Doc.#9.)

[11] Sections 28 and 29 permit JCLO to intervene under Section 97 in **any** civil or criminal appeal or case in circuit court that is remanded from appeal, where the Attorney General is appearing for the State, *see* Section 28, or in **any** case where the Attorney General is representing the State employee as a witness, or "any cause or matter, civil or criminal, in which the state or the people of this state may be interested." *see* Section 29. Section 99 confirms the same intervention right in the rules of appellate procedure.

78, Doc.#1.) Furthermore, the new intervention procedures created in sections 5 and 97, as well as Sections 28, 29, and 99, encroach on the judiciary's exclusive power to determine questions of representation and obstruct the judiciary's efficient administration of cases. The Court will likely find that these sections of the Act violate the separation of powers.

1. Litigating on behalf of the state is an Executive function exercised by the Attorney General and Governor—not the Legislature.

Wisconsin's Constitution, in combination with a statutory framework that has existed since the founding, establishes that litigating on behalf of the State is a core executive power which no other branch of government may exercise or burden. These powers reside with the Attorney General and the Governor as members of the executive branch.

The powers of the Attorney General are executive powers: "[t]he attorney general is a high constitutional executive officer. He is an important law enforcement officer of the state. In a broad sense he is the attorney for our body politic." *State v. Woodington*, 31 Wis. 2d 151, 166–67, 142 N.W.2d 810, 818 (1966) (emphasis added). "The attorney-general is the law officer of the government, elected for the purpose of prosecuting and defending all suits for or against the State. . . And being elected as the law officer of the State on account of his peculiar fitness and qualifications for the position. . ." *Orton v. State,* 12 Wis. 509, 511 (1860).

"[B]y the Constitution [the Attorney General] is given only such powers as 'shall be prescribed by law.'" *State v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 179, 116 N.W. 900, 905 (1908). In 1848, the framers of Wisconsin's constitution would have understood the term "attorney general" to mean the chief law officer of the state. For example, the Judiciary Act of 1789 created the position of United States Attorney General as the chief

law officer of the United States to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned…" Although the framers did not use the term "vest" in describing the Wisconsin's Attorney General's authority, *see* Wis. Const. art. VI, § 3, the role and purpose of the Attorney General was plain. The Attorney General was an executive officer, who was to be the State's chief law officer representing the government in litigation and serving as its principal legal adviser.

The Attorney General's representation of the State, as a matter of course, is further evidenced by the legislation the framers enacted contemporaneously with the Constitution:

> The first legislature that convened after the adoption of the Constitution enacted what is now sec. [165.25(1m)] which provides that the attorney general on request by the governor or either branch of the legislature shall prosecute [or defend] in behalf of the state before any court in any county any matter in which the state. . . may be interested. The enactment of the statute by the legislature of 1849 was contemporaneous with the adoption of the Constitution. **The enactment and its subsequent continuance to the present day is a constitutional interpretation which is conclusive**."

State v. Coubal, 248 Wis. 247, 256, 21 N.W.2d 381 (1946); R.S.1849, c. 9, § 36 (emphasis added).[12] This statutory language has largely gone unchanged. *See* Wis. Stat. § 165.25(1m).

In addition to the Attorney General, the Governor has authority to direct litigation initiated by or against the State. The Legislature has acknowledged as much in statute, confirming that the Governor informs the Attorney General when representation of the State is needed, *see* Wis. Stat. §§ 14.11(1), 165.25(1m), or employs outside ("special") counsel. Wis. Stat. § 14.11(2). Like Wis. Stat. § 165.25, the statutory language of Wis. Stat. § 14.11 regarding employment of special counsel originated with the enactment of the Constitution.[13]

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[12] Revised Statutes of the State of Wisconsin, Passed Jan. 10, 1849 accessible electronically at: https://babel.hathitrust.org/cgi/pt?id=wu.89096048889;view=1up;seq=105

[13] This original statutory language stated:

The Wisconsin Supreme Court has held that the power of the Governor to employ and direct special counsel in the stead of the Attorney General is exclusive. "That authority is plainly and distinctly given to another officer of the government [the Governor], who **alone can exercise it**, and render the State liable to pay for legal services rendered." *Orton,* 12 Wis. at 511–12 (emphasis added). The Constitution vests this executive power in the Governor. Wis. Const. art. V, § 1. Through these Constitutional and contemporaneous statutory provisions, the framers guaranteed the Executive's sole control over State litigation.

While the Attorney General and Governor have clear authority to direct litigation as heads of the Executive Branch, it is equally clear that the Legislature has no role in prosecuting or defending litigation involving the State whatsoever. As noted above, the Legislature's role is to declare whether there should be a law and set the policy and parameters of the law—not litigate. *See Clintonville*, 248 Wis. at 68-69. In *Helgeland v. Wisconsin Municipalities*, the court explicitly rejected the Legislature's argument that its public policy prerogative vested it with the authority to defend the constitutionality of statutes:

> Furthermore, the legislature have also provided that the governor, whenever he shall receive notice of the commencement of any suit or proceeding between other parties, by which the rights, interests or property of the State shall be liable to be injuriously affected, shall inform the attorney-general thereof, and require him to make every legal and equitable defense against such suit or proceeding; and in any such case, or in any suit prosecuted or defended in behalf of the State, if the public interests require, the governor is authorized and required to employ such counsel as he may deem proper to assist the attorney-general, or, in case of the sickness or absence of the attorney-general, or when he may be interested adversely to the State, to employ counsel to act in his stead. **Sec. 2, chap. 9, R. S., 1849**

Orton, 12 Wis. 509, 511–12 (emphasis added); R.S.1849, c. 9, § 2, revised Statutes of the State of Wisconsin, Passed Jan. 10, 1849, accessible electronically at: https://babel.hathitrust.org/cgi/pt?id=wu.89096048889;view=1up;seq=98

> **[B]y claiming an interest in defending its statutes against constitutional challenges, the Legislature conflates the roles of our government's separate branches**. Under our tripartite system of government, the legislature's role is to determine public policy by enacting legislation. In contrast, it is exclusively the judiciary's role to determine the constitutionality of such legislation, and **it is the executive's role to defend the constitutionality of statutes.**

2006 WI App 216, ¶ 14, 296 Wis. 2d 880, 903, 724 N.W.2d 208, 219, *aff'd*, 2008 WI 9, ¶¶ 10-14, 307 Wis. 2d 1, 745 N.W.2d 1 (emphasis added) (citations omitted). "The Legislature's interest in this respect is limited to establishing policy through the enactment of constitutional legislation." *Id.* ¶ 11.

Moreover, in declaratory judgment actions, the executive branch is the legal representative of all parties with an interest in upholding the validity of a statute. The Declaratory Judgment Act calls upon the executive branch to "act in a representative capacity in behalf of the legislature and the people of the state to uphold the constitutionality of a statute of statewide application." *City of Kenosha v. Dosemagen*, 54 Wis. 2d 269, 271, 195 N.W.2d 462, 464 (1972). The Declaratory Judgment Act does:

> not require the joinder[14] as parties, in a declaratory action to determine the validity of a statute. . . **of any persons other than the public officers charged with the enforcement of the challenged statute**. . . Such defendant public officers act in a representative capacity in behalf of all persons having an interest in upholding the validity of the statute. . . under attack**.**

White House Milk Co. v. Thomson, 275 Wis. 243, 249, 81 N.W.2d 725, 728–29 (1957) (emphasis added). "If it were [not] so construed, the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity of legislative enactments, either state or local, since such enactments commonly

[14] Intervention and joinder operate similarly and are comparable legal devices. *See City of Madison v. Wisconsin Employment Relations Comm'n*, 2000 WI 39, 234 Wis. 2d 550, 559, 610 N.W.2d 94, 98 n. 8.

affect the interests of large numbers of people." *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 334, 81 N.W.2d 713, 717 (1957).

2. Sections 5, 26, 30, and 97 of Act 369, as well as Sections 28, 29, and 99, unconstitutionally intrude on the Executive's core litigation power and allocate this executive function to the Legislature.

These portions of Act 369 are unconstitutional in two ways: first, they limit the Executive's ability to enforce the law, and second, they give the Legislature the Executive's law enforcement power. This occurs in Section 5, 26, 30, and 97, challenged by the Plaintiffs, as well as Sections 28, 29, and 99.

Through these sections, the Legislature seriously hampers and usurps the Executive's ability to direct litigation by and on behalf of the State by removing the Attorney General and Governor's ability to settle or discontinue litigation, and by prohibiting settlement when the validity of a statute is at issue. Act 369, §§ 26, 30. The power to dismiss or settle cases is part and parcel of litigation, baked into the statutes, *e.g.*, Wis. Stat. § 802.12 (permitting court to order parties to attempt settlement) and encouraged as a means to "'save the parties the substantial cost of litigation and conserve the limited resources of the judiciary,'" *Matter of Estates of Zimmer*, 151 Wis. 2d 122, 442 N.W.2d 578 (Ct. App. 1989) ("'We acknowledge the strong public interest in encouraging settlement of private litigation.'") (quoting *Bank of Am. Nat'l Trust v. Hotel Rittenhouse*, 800 F.3d 339, (3rd Cir. 1986)). The Governor and the Attorney General are best suited to strategically use the State's limited resources and made decisions to most efficiently enforce Wisconsin law. *See State v. Schell*, 2003 WI App 78, ¶¶ 15-19, 261 Wis. 2d 841, 661 N.W.2d 503 (finding court exceeded its authority and burdened executive's power to administer probation when it precluded sheriff from permitting home monitoring of inmate) (noting the sheriff, "perhaps more than any other

person, is in the best position to undertake [safety, budgetary and space constraint] analyses" of different confinement options). Prior to Act 369, the Department of Justice would typically consult with the agency involved in a case before settling it, as in a personnel matter. (Richard Aff., ¶ 21.)

By inserting another entity in the decision on how and whether to settle or discontinue cases—an entity whose motives will likely be different from the original parties —Act 369 intrudes on the Executive's core power to conduct litigation on behalf of the State and will likely delay, deter, or impede settlements with or that will benefit the State. (Greene Aff., ¶ 11.) This may expose the agency to extra financial risk or require additional resources to continue litigation and address uncertainty that may have otherwise been concluded through settlement. (Richard Aff., ¶ 21.) Act 369 has already prevented the Governor and Attorney General from withdrawing from litigation regarding the federal Affordable Care Act in the Northern District of Texas. (Nilsestuen Aff., ¶¶ 23-24 & Exs 2, 3.) This litigation was initiated by the Executive Branch prior to Act 369, but the Legislature has not allowed withdrawal—despite Governor Evers' judgment that he cannot "continue to allow the use of taxpayer resources toward a lawsuit that could undermine the health security of the people of the state." *Id.* Further, under sections 26 and 30, it is unclear how the government will properly comply with orders to appear at settlement conferences or comply with mediation requirements. The extra steps required by Act 369 will also make it more difficult to obtain settlements in time-sensitive matters. (Richard Aff., ¶ 21.)

It is unconstitutional for the Legislature to so encroach on the Executive's exercise of its power and duty to litigate for the State.

> [W]hatever power or duty is expressly given to, or imposed upon the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case, where the subject is committed to the discretion of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise. While the legislature has a legitimate interest in keeping itself apprised of the activities of the Authority, it cannot do so in a manner that interferes or precludes the exercise of constitutionally conferred executive power.

Nusbaum, 59 Wis. 2d at 450. Even if litigation were not a core power, Act 369's removal of these abilities from the Governor and Attorney General unduly burdens and substantially impairs the executive's ability to conduct litigation as an executive function. *See Martinez*, 165 Wis. 2d at 696–97. It is unconstitutional either way.

Additionally, Sections 5, 26, 30, and 97 of Act 369 make the Legislature a central party to litigation concerning the validity or even "construction" of statutes. Section 5 and 97 entitle the Legislature to join as a party in any such actions, despite *Helgeland* and *White House Milk* establishing that this is the Executive's role and not the Legislature's. Sections 5 and 97 similarly permit the Legislature to retain its own counsel and participate in the action fully even if the Legislature has no interests that are identifiably different from the State. The same is true for Section 28, 29, and 99, which entitle the JCLO to participate in virtually any appeal or other case where the State has an interest. The Legislature is not an appropriate party to appear in these cases, because the Legislature does not enforce the laws. *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480–81, 556 N.W.2d 127, 129 (Ct. App. 1996) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them. . ."). Its intervention will also be costly to Wisconsin taxpayers, who must pay for private counsel, and because litigation is likely to more complicated and prolonged with the addition of extra parties. (Greene Aff., ¶ 10.) The

Legislature's attempt to grant itself a substantial role in the legal defense of the validity of statutes and participate in litigation, and thus exercise the Executive's power, should not withstand constitutional scrutiny.

Plaintiffs are likely to succeed on the merits of their claim that Sections 5, 26, 30, and 97 of Act 369 are unconstitutional. The Court should extend this finding to Sections 28, 29 and 99 as well.

3. Act 369 burdens the Judiciary's authority to determine appropriate representation and intervention.

In addition to intruding on the Executive, portions of Act 369 intrude on the powers of the Judiciary by granting legislative bodies the authority to intervene in the litigation with new counsel. Act 369, §§ 5, 97. Sections 28, 29 and 99 also grant the legislature's joint committee on legislative organization a right of intervention in appeals and other cases. The Legislature has taken the position in other litigation that the courts have no say in the matter once a motion for intervention under Sections 5 and 97 has been filed. *Affidavit of Counsel, Ex. D.* Interpreted this way, this unprecedented procedure assumes powers exclusive to the Judiciary by granting legislative bodies the power to intervene without a discretionary assessment by the court.[15] The Court will likely find that these sections are unconstitutional and they should be enjoined.

In actions concerning the validity of a statute, the Executive represents all interested parties. *See White House Milk Co.*, 275 Wis. 243, 249. This includes the Legislature, as the Attorney General "act[s] in a representative capacity in behalf of the legislature. . . to uphold the constitutionality of a statute of statewide application." *City of Kenosha*, 54 Wis.

[15] Governor Evers does not concede this interpretation, but given the Legislature's recently stated understanding, he has no option but to accept it for the sake of argument here.

2d 269, 271. "[A]s the law officer of the State on account of his peculiar fitness and qualifications for the position, [the Courts] are not to presume that he will not be fully competent to protect and guard the interests and rights of the people." *Orton*, 12 Wis. 509, 511.

In the absence of the Attorney General, the Governor directs special counsel to represent the State. Wis. Stat. § 14.11(2); *Orton,* 12 Wis. at 511-12. Beyond this arrangement, it is exclusively for the courts, not the Legislature, to determine when compelling evidence establishes that the Attorney General or Governor cannot provide adequate representation for the State and its bodies, and the court is left to appoint alternative counsel. *See Koschkee v. Evers*, 2018 WI 82, 382 Wis. 2d 666, 913 N.W.2d 878; s*ee also State* ex rel*. Bolens v. Frear,* 148 Wis. 456, 134 N.W. 673, 700 (1912). This exclusive power is one the court does not invoke lightly. *Koschkee*, 382 Wis. 2d 666, ¶ 12. "The judiciary's exclusive inherent authority is immune from legislative abrogation." *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 748, 595 N.W.2d 635, 640 (1999). When, "a specific function falls within the court's exclusive inherent authority, neither the legislature nor the executive branches may constitutionally exercise authority within that area." *Id.*

The courts must not yield to the Legislature the power to unilaterally become a party represented by outside counsel in actions where the validity or construction of a statute is at issue. The "inherent powers exclusive to courts are few in number. Under our system of separation of powers, those finite exclusive powers should be 'jealously guarded.'" *Barland v. Eau Claire Cty.*, 216 Wis. 2d 560, 599, 575 N.W.2d 691, 707 (1998). "As to these areas of authority, ... any exercise of authority by another branch of government is

unconstitutional." *Gabler*, 376 Wis. 2d 147, ¶ 31. Therefore, the court will likely find Sections 5 and 97 facially unconstitutional.

Furthermore, if Sections 5 and 97 grant legislative bodies entitlement to intervene in actions concerning the validity or construction of a statute, those sections substantially interfere with the Court's "inherent authority to ensure that 'the court functions efficiently and effectively to provide the fair administration of justice.'" *State v. Chvala*, 2003 WI App 257, ¶ 19, 268 Wis. 2d 451, 463, 673 N.W.2d 401, 406. The same is true for Sections 28, 29, and 99 which extend intervention to the JCLO in appeals and any case where the governor or either house of the legislature have requested representation. Courts have previously held that intervention as a matter of right is only appropriate "where the intervenor is 'necessary to the adjudication of the action'" *Helgeland*, 2006 WI App 216, ¶ 6 (citations omitted).

"Despite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments." *Helgeland*, 2008 WI 9, ¶ 41. The court uses its discretion to determine whether a party is entitled to intervene as a matter of right.

> The analysis is holistic, flexible, and highly fact-specific. A court must look at the facts and circumstances of each case "against the background of the policies underlying the intervention rule.". . .On the one hand, "[t]he original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit...." On the other hand, "persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies.

Id. ¶ 40 (citations omitted). "'[E]very person whose interests are affected' need not be made a party." *Koschkee*, 382 Wis. 2d 666, ¶ 25 (quoting *Helgeland*, 307 Wis. 2d 1, ¶ 140). Nonetheless, the Legislature contends that its new intervention procedure in Act 369, entitles its participation in actions relating to a statute's validity or construction despite the large body of case law providing that the Executive's participation and representation are adequate.

The Legislature has overstepped its bounds. "[T]he power to regulate procedure, at the time of the adoption of the Constitution, was considered to be essentially a judicial power." *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 720–21 (1931). "While the Legislature may regulate in the public interest the exercise of the judicial power, it cannot, under the guise of regulation, withdraw that power or so limit and circumscribe it as to defeat the constitutional purpose." *State v. Stenklyft*, 2005 WI 71, ¶ 89, 281 Wis. 2d 484, 533–34, 697 N.W.2d 769, 793. The "court preserves a place of paramount importance for the principle that 'a truly independent judiciary must be free from control by the other branches of government.'" *Gabler*, 376 Wis. 2d 147, ¶ 38. Under these principles, the Legislature cannot unilaterally entitle itself (or its parts) to intervene in cases before the courts.

Act 369 §§ 5 and 97, and 28, 29, and 99 encroach upon the Judiciary's exclusive power to decide questions of legal representation and unduly burden its power to efficiently and effectively administer justice. The Court will likely declare these sections unconstitutional.

C. The Sections of Act 369 that grant the Legislature a "legislative veto" violate the Constitution's requirements for bicameralism and presentment and impermissibly infringe on executive powers; many of those same provisions, plus two in Act 370, also violate the Constitution's requirement for legislative quorum and impermissibly infringe on judicial powers.

Sections 10, 11, 16, 26, 30, 64, and 87 of Act 369 and Sections 10 and 77 of Act 370 impermissibly burden the executive and judicial branches. They also violate the Constitution's constraints on the Legislature itself, because they permit committees of the Legislature to act in its stead and avoid the executive veto. The Court will likely find these provisions unconstitutional.

1. The Legislature has a history of seeking to unconstitutionally hoard power from the other branches of government, providing for illegal legislative vetoes, and impermissibly concentrating its power in the hands of a select few.

As noted at the outset of this brief, *supra* at 2, there is "the tendency, in republican forms of government, to the aggrandizement of the legislative branch at the expense of the other branches," *State* ex rel. *Kleczka v. Conta,* 82 Wis. 2d 679, 709, n.3, 264 N.W.2d 539 (1978). Unsurprisingly, this is not the first time the Legislature has enacted unconstitutional legislative veto provisions, violating the bicameralism and presentment requirements of Article IV, section 17 and Article V, section 10 of the Wisconsin Constitution. Nor is it the first attempt to unconstitutionally infringe on judicial powers, violating Article VII, section 2, or delegate lawmaking functions to a committee, violating the quorum requirement of Article IV, section 7. Such efforts go back more than 60 years. Governor Evers joins the Plaintiffs' arguments in Sections I.B. and C. of their brief (Doc.#9) and incorporates them herein by reference, as modified.

In 1954, Wis. Stat. § 227.031 allowed the Legislature to "by joint resolution disapprove any rule then in effect." Such disapproval purportedly voided the rule as though repealed. 43 Op. Atty. Gen. 350, 350-51 (1954). In 1963, the Legislature considered delegating to a legislative committee the power to void any rule by affirmative vote of 4 members. 52 Op. Atty Gen. 423 (1963). In 1974, the Assembly and Senate again considered such measures. 63 Op. Atty. Gen. 159 (1974).

In its 1954 opinion, the Attorney General advised that "the legislature cannot constitutionally abrogate or modify a duly issued rule of an administrative agency by the mere passage of a joint resolution…", as such efforts violated both Article IV, section 17 and Article V, section 10 of the Wisconsin Constitution. 43 Op. Atty. Gen. 350, 359-60. In

the 1963 opinion, the Attorney General considered a proposed statute that would delegate to a legislative committee the power to void any administrative rule, and concluded that this similarly would be unconstitutional if enacted "in attempting a change in law by repeal or change in administrative rules by other than the enactment of a bill." 52 Op. Atty. Gen. 423, 424 (1963).

In 1974, a third Attorney General concurred with both his predecessors on bicameral and presentment grounds that the Legislature could not revoke or suspend a rule by joint resolution, 63 Op. Atty Gen. 159, 162 (1974). He also found that such efforts would violate separation of powers vis à vis the legislative and executive branches because "a joint resolution deprives the executive branch of government the opportunity to exercise its power to veto an act of the legislature." *Id.* at 163.[16]

If a legislative committee or joint resolution effort were viewed not as to "suspend or revoke" but instead to "affirm or set aside" a rule, it would be a judicial act, thus implicating separation of powers concerns between the legislative and judicial branches. *Id.* at 164. Absent "ascertainable standards" in the enabling legislation for the reviewing body to apply, and the availability of judicial review, the attorney general found separation of powers principles would be violated under this approach as well. *Id.* at 165-66.

Summarizing both of the separation of powers analyses and the bicameralism and presentment analysis, the Attorney General concluded:

> **[T]he legislature could empower itself or a committee of its members to affirm or set aside an agency's rule if the legislature or the committee were subject to proper**

[16] The 1974 opinion also observed that there is "no material distinction between repealing a law and suspending or revoking it." 63 Op. Atty. Gen. at 163. In another opinion issued that same day, the Attorney General concluded that a committee of the Legislature likewise could not suspend an administrative rule, as "this can be done only be presentment of a bill to the governor." 63 Op. Atty. Gen. 168, 172 (1974).

> **standards and safeguards**….To repeal an administrative rule other than pursuant to such standards or in the absence of such safeguards, however, is to abrogate what is, by definition, a valid statutory interpretation or application. Therefore, it is to unconstitutionally encroach on executive or judicial functions or both…

63 Op. Atty. Gen. at 163 (emphasis added).[17]

By 1992, the legislature found a path to exercise oversight of administrative rules with sufficient standards and safeguards to pass constitutional muster. At that time, Wis. Stat. § 227.26 allowed the legislature's Joint Committee for Review of Administrative Rules ("JCRAR") to temporarily suspend a rule pending bicameral review by the legislature and presentment to the governor for veto or other action. The law was "carefully drawn to avoid a separation of powers challenge and meets presentment and bicameral requirements." *Martinez*, 165 Wis. 2d at 692.

In analyzing the statute, the Court first considered the legislative/judicial separation of powers challenge. Observing that Wis. Stat. § 227.19(4)(d) described narrow grounds upon which JCRAR could temporarily suspend a rule, it found those grounds to be "adequate standards for JCRAR to follow when exercising its powers." *Martinez*, 165 Wis. 2d at 698. As to the balance of powers between the legislative and executive branches, the court found that the full involvement of the Legislature and Governor distinguished the law from those found in other states to violate separation of powers doctrines. *Id.* at 700.

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[17] In *Martinez, infra* at 702*,* the supreme court misquoted the bolded portion of this passage, substituting "or" for "and" between the words "standards" and "safeguards." The correct language is "if the legislature or committee were subject to proper standards **and** safeguards." The attorney general opinion uses the phrase "standards and safeguards" several times, but never uses "standards *or* safeguards." As shown in that opinion, proper "standards" are statutory criteria against which the committee may evaluate a rule, and availability of judicial review, to avoid a violation of separation of powers between the legislative and judicial branches. Proper "safeguards" are the checks and balances necessary to meet legislative/executive separation of powers requirements as well as bicameralism and presentment requirements in the Constitution. **Both** "standards **and** safeguards" are needed to pass constitutional muster. This is also consistent with the *Martinez* decision.

In considering the bicameral and presentment challenges, the court found that the "mandatory checks and balances" process, i.e. the "formal bicameral enactment process coupled with executive action," saved the law from violating those requirements of the Constitution. *Id.* at 699. Crucial to the court's analysis was that the statute "unambiguously define[d] the effect of the committee's efforts as follows: 'If both bills…are defeated, or fail to be enacted in any other manner, the rule remains in effect and the committee may not suspend it again.'" *Id.* at 700.

In sum, under *Martinez,* if a statute is to allow a legislative committee to temporarily suspend a rule, in order to avoid unconstitutional encroachment on the judicial branch, it must provide standards against which to measure such rules and allow for judicial review. In order to avoid unconstitutional encroachments on the executive branch, and to meet bicameralism and presentment requirements, it must couple the bicameral enactment process with executive presentment for action. Anything short of all of those conditions fails constitutional scrutiny.

2. Legislative oversight of existing rules under Chapter 227, as amended by Section 64 of Act 369, unconstitutionally infringes on executive powers, and violates bicameralism, presentment, and quorum requirements in the Constitution.

Until the passage of Act 369, Wis. Stat. § 227.26 maintained the same general standards and safeguards as existed in 1992. While avoiding the judicial separation of powers concern identified by the plaintiffs in *Martinez* by preserving the narrow criteria upon which JCRAR may suspend a rule, Section 64 of Act 369 drastically alters the bicameralism and presentment aspects, and consequently also the separation of powers safeguards against legislative infringement on executive functions, of the previously carefully drawn law. Under Act 369, even if the bicameral Legislature rejects JCRAR's bill to repeal a rule, or

simply does not take it up, the committee may suspend the rule again, over and over, effectively repealing it while ignoring the bicameral process and cutting the Governor out. This alteration makes Wis. Stat. § 227.26, as amended, substantively no different from those laws and bills found in 1954, 1963 and 1972 to be unconstitutional. In the process, Section 64 of Act 369 also violates the Constitution's quorum requirement in Article IV, section 7 of the Wisconsin Constitution, for it allows the committee to do this alone, acting in a legislative capacity.[18] The Court will likely find Section 64 to be unconstitutional.

3. Sections 10 and 11 of Act 370 and Section 87 of Act 369, all of which require the Legislature's joint committee on finance to approve an administrative act, also violate these same constitutional requirements.

Section 10 of Act 370 requires "legislative" authorization and oversight of certain Department of Health Services requests to the federal government, though that "legislative" authorization and oversight is to come from the Legislature's joint committee on finance, or some other legislative "standing committee," not the full Legislature. Section 11 of Act 370 suffers from the same flaw, requiring the Department of Workforce Development to obtain the approval of the legislature's joint committee on finance before reallocating public assistance and local assistance funds. Similarly, Section 87 of Act 369 requires the Wisconsin Economic Development Corporation to seek the approval of any new enterprise zone from Legislature's joint committee on finance.

While it is true that under Wis. Stat. § 13.10 (4), actions of the joint committee on finance are subject to executive presentment and disapproval, there is no similar allowance for the actions of a "standing committee" assigned review of a request under Section 10, violating at least the presentment clause. Moreover, even the Governor's disapproval of a

[18] *Martinez* did not consider any arguments on the quorum provision.

joint committee on finance's action under Wis. Stat. § 13.10 (4) is not a proper veto at all, for under such provision, "the part objected to shall be returned to the committee for reconsideration." This is akin to requiring the Governor to return a partially vetoed bill, including the approved portion, to the Legislature before publication. No matter how necessary the agency proposal might be, the agency could not move forward until the committee took action on reconsideration *and* chose an action that the Governor approved. The cycle of committee action and Governor disapproval could repeat over and over, preventing the agency from pursuing its proposed course of action indefinitely. The Supreme Court found such an approach would violate the presentment requirement of the Constitution if applied to a veto of a bill. *State* ex rel. *Kleczka v. Conta,* 82 Wis. 2d 679, 697-97, 264 N.W.2d 539 (1978). The back door legislative committee vetoes allowed by Act 370 Sections 10 and 11 and Act 369 Section 87 do as well.

These provisions also suffer from the same lack of standards necessary to avoid an unconstitutional infringement on the judicial branch as Sections 16, 26, and 30 do, discussed *infra*. The bicameral Legislature is wholly excluded from the process, thus also violating the bicameralism clause. Finally, these legislative committees cannot act on behalf of the Legislature in the ways described in these provisions, and thus they violate the quorum requirement of Article IV, section 7 of the Wisconsin Constitution.

4. Sections 16, 26 and 30 of Act 369 violate bicameralism, presentment and quorum requirements, unconstitutionally infringe on executive powers, and also unconstitutionally infringe on judicial powers.

Section 16 requires the Department of Administration to seek the approval of the Legislature's joint committee on legislative organization if it wishes to change rules relating to security at the capitol. Sections 26 and 30 require the Department of Justice, part of the

Executive branch, to obtain legislative committee approval[19] to resolve certain lawsuits through certain means. If no approval is provided, the lawsuit cannot be resolved as deemed appropriate by the State's lawyers. In all of these sections, no standards are described for legislative committee approval or disapproval, and thus the judiciary's powers are unconstitutionally infringed upon. Nor is there any process through which the Legislature must pass on the committee's (or party's) decision, much less any law presented to the Governor for approval or veto. This plainly violates the Constitution's mandates of bicameralism, presentment, and quorum, and unconstitutionally infringes on executive powers. *Martinez, supra; Dammann,* 228 Wis. 147, 277 N.W. at 279.

The Plaintiffs are likely to succeed on the merits of their claim that Sections 10, 11, 16, 26, 30, 64, and 87 of Act 369 and Sections 10 and 77 of Act 370 are unconstitutional.

II. A temporary injunction is necessary to preserve the status quo.

The Governor agrees with the Plaintiffs that a temporary injunction is necessary to preserve the status quo (Pls' Br. at 17-18, Doc.#9), or more accurately, return the status quo to pre-Act 369 and 370 conditions. "[C]ourts define 'status quo' as the last peaceable, uncontested status of the parties which preceded the actions giving rise to the issue in controversy." *Praefke Auto Elec. & Battery Co. v. Tecumseh Prod. Co.,* 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000); *accord, e.g., Stemple v. Bd. of Ed. of Prince George's Cty.,* 623 F.2d 893, 898 (4th Cir. 1980). Most of the challenged provisions of the extraordinary session legislation are in effect now, and their burdens are already being felt within the Executive branch and the

[19] Sometimes, but not always, the joint committee on finance; for constitutional infirmities connected to that committee's approval, see the previous subsection. Other times, approval must be obtained from the joint committee on legislative organization or the legislature as a party to a lawsuit—not via passage of a bill and presentment to the Governor.

agencies. *See* Section III, *infra*. Those provisions that are not in effect, such as the agency guidance "sunset" on July 1, 2019, will begin to have an impact in the very near future as agencies attempt to retroactively comply with the legislation for thousands of pieces of agency guidance. Pre-Act 369 and 370 conditions served the State of Wisconsin well for decades, providing the Legislature with adequate oversight of rulemaking, permitting the executive to implement the law and litigate on the State's behalf, and allowing for judicial review when necessary. The Court should maintain these conditions while it considers this case and the constitutionality of the significant changes wrought by the new law.

To account for the possibility that after granting a temporary injunction, the Court could ultimately agree with the Legislative Defendants on the merits, the injunction should move the date of the guidance document "sunset" back for the same amount of time as the injunction is in effect. For example, if the injunction is in effect for four months, the July 1, 2019, sunset should be delayed until November 1, 2019. This will prevent the agencies from expending unnecessary resources to comply with the sunset on the chance that the injunction is lifted later. If the Legislative Defendants prevail, this arrangement still ensures compliance with the new law, but on a slightly different timeframe.

III. The Plaintiffs and the Executive Branch will suffer irreparable harm if the injunction is not granted.

The Plaintiffs have moved to enjoin violations of the Wisconsin Constitution that "damage the fundamental balance of power in the State, diminish the public's trust in its state government, dissipate taxpayer funds in a manner that prevents those funds from being recovered, and upset ongoing reliance on guidance provided by executive branch agencies." (Pls' Br. at 18-25, Doc.#9.) The Governor concurs with Plaintiffs that an injunction is necessary to protect Plaintiffs from irreparable harm. Not only will Plaintiffs suffer

irreparable harm absent a temporary restraining order or injunction, the Executive Branch, including the Governor and his ability to take care that the laws be faithfully executed, will be harmed as well.

The United States Supreme Court has consistently held that the violation of a constitutional right creates irreparable harm per se. *See Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") An injury is irreparable if the legal remedy will not be adequate, *Pure Milk Prods. Co-op v. National Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979), or if the injury is "not adequately compensable by money damages." *Nettesheim v. S.G. New Age Prods., Inc.,* 2005 WI App 169, ¶ 21, 285 Wis. 2d 663, 702 N.W.2d 449. Injunctive relief is appropriate here, to ensure the Legislature cannot "with impunity violate the constitutional limitations of its powers." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878-79, 419 N.W.2d 249 (1988) (quoting *Columbia Cty. v. Wis. Ret. Fund*, 17 Wis. 2d 310, 319, 116 N.W.2d 142 (1962)).

In addition to the constitutional harm, as detailed in the Affidavits submitted herewith, the "Facts" section of this brief, and Sections I.A.-I.C., supra, the Executive Branch is suffering irreparable harm as a result of the laws challenged here. Litigation involving the State has become more complex and costly. The Executive Branch is impeded from fulfilling its Constitutional duty to take care that the laws are faithfully executed, illustrated by the impediments to withdrawing the State from the challenge to the Affordable Care Act. The guidance document requirements of Act 369 are causing and will continue to cause administrative agency staff to divert their attention from their core missions, delay provision of services, compromise operations, and expend limited funding and resources on

complying with those requirements and creating new layers of bureaucracy, rather than provide actual services, support and assistance to taxpayers. To manage the significant workload associated with the guidance document process without such negative effects, the agencies will need to hire numerous staff, using tax dollars. Likewise, the requirements contained in Act 370 for agencies to obtain permission from legislative bodies or others prior to seeking waivers and amendments in federal programs has the potential to interfere in agency program administration for the benefit of state taxpayers.

All of those harms ultimately befall the public and the Plaintiffs. Services to the public are being and will be disrupted, diminished, delayed, and even denied. Absent an injunction, tax dollars will be spent on implementing the challenged laws; these are funds that can never be recovered through a money judgment against a wrongdoer. The State will remain engaged in unnecessary costly, and increasingly complicated litigation.

Organizational Plaintiffs, such as the SEIU and other unions, will also be harmed because they cannot rely on agency guidance. (Compl. ¶ 84, Doc.#1.) Organizations like Disability Rights of Wisconsin will be hindered in their advocacy and support for people with disabilities and forced to divert resources to, among other things, ensuring that newly adopted, amended, or rescinded agency guidance does not harm people with disabilities' access to Medicaid and other services upon which they rely. (Kerschensteiner Aff., ¶ 14.) Laws that require organizations to divert resources from their core missions or to impose injury upon their members inflict irreparable harms. *See, e.g.*, *Wis.'s Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 19-20, 230 N.W.2d 243 (1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir.

2007), *aff'd*, 553 U.S. 181 (2008). The Court should grant the injunction for this reason as well.

CONCLUSION

For the reasons stated above, Governor Evers supports the Plaintiffs' motion for a temporary restraining order and temporary injunction. If the Court grants the injunction, it should modify the effective date of certain provisions of the law as requested in Section II, *supra*, regardless of its ultimate decision on the merits.

Respectfully submitted this 20th day of February, 2019.

PINES BACH LLP

Electronically signed: Christa O. Westerberg

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Christa O. Westerberg, SBN 1040530
Beauregard W. Patterson, SBN 1102842

Attorneys for Governor Tony Evers, Defendant

Mailing Address:
122 West Washington Ave
Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
lpines@pinesbach.com
tpackard@pinesbach.com
cwesterberg@pinesbach.com
bpatterson@pinesbach.com